86-313

Supreme Court, U.S.
FILED
AUG 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GRECIA GONZALEZ,

Petitioner,

v.

PUBLIC HEALTH TRUST, a/k/a
JACKSON MEMORIAL HOSPITAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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27pp

QUESTION PRESENTED

Whether in an employment discrimination case tried to a jury under 42 U.S.C. Sections 1981 and 1983 the determination letter of the Equal Employment Opportunity Commission must be admitted into evidence when offered by a party to the cause?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No.

GRECIA GONZALEZ,

Petitioner,

v.

PUBLIC HEALTH TRUST a/k/a
JACKSON MEMORIAL HOSPITAL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Grecia Gonzalez petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, ___) is not reported. The Judgment of the District Court (App. B, ___) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on April 28, 1986. A Petition for Rehearing was de-

nied on June 6, 1986 (App.C ___). The Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTES AND RULE INVOLVED

1. 42 U.S.C. §1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

2. 42 U.S.C. §1983 provides in pertinent part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. Rule 803 (8)(C) Federal Rules of Evidence provides:

> "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth . . . (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstance indicate lack of trust worthiness."

STATEMENT

The Petitioner, Plaintiff in the U.S. District Court for the Southern District of Florida, sued her employer, Public Health Trust d/b/a Jackson Memorial Hospital[1] for employment discrimination and for forbidden retaliatory action under 42 U.S.C. §2000 e-2, 42 U.S.C. §1981 and 42 U.S.C. §1983 (R.1-1-1 to 10). Jurisdiction was vested in the District Court by 28 U.S.C. §1343.

As is usual in these cases, the litigation began when Ms. Gonzalez filed a charge with the Equal Employment Opportunity Commission that she had been prevented from obtaining a promotion because of national origin discrimination (R.1-26-3). After this initial charge was filed, the Petitioner filed another charge with the EEOC, alleging that her employer had retaliated against her in the terms and conditions of employment.

Ms. Gonzalez obtained a right to sue letter before the EEOC could make a determination on the merits

[1] The Public Health Trust is a State agency for the purposes of 42 U.S.C. §1983.

of her first charge (R.1-26-3). However, the EEOC did reach the merits of the Petitioner's second charge. It found that there was no reasonable cause to believe that the allegation regarding retaliation was true (Def. Exhibit 99, App.D ___).

The complaint embodied both charges and the case proceeded to trial on both charges. The alleged violations of §2000 e-2 were tried to the Court while the alleged §1981 and §1983 violations were simultaneously tried to a jury.

During the course of trial, the Public Health Trust offered into evidence the EEOC's one page determination letter containing the "no reasonable cause" finding (R.2-57, Def. Exhibit 99, App. D ___). Counsel for Ms. Gonzalez objected to the introduction of the letter on the ground of heresay (R.2-57). Counsel also argued that the letter should not be admitted unless the entire EEOC file was also admitted (R.2-57).

Counsel for the employer argued that the determination letter was admissable under the Fifth Circuit's Decision in *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972).[2] Relying on *Smith*, the trial court admitted the document into evidence (R.2-63).

The Petitioner abandoned her retaliation claim at the close of the Plaintiff's case (R.2-87), but failed to move to strike the determination letter. Later, in closing argument, counsel for the employer referred to

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[2] *Smith* is binding precedent in the 11th Circuit under the ruling in *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc) that all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981 are binding precedent in the 11th Circuit.

the EEOC's finding as an indication of Ms. Gonzalez' tendency to file discrimination complaints without any basis for them (R.3-225).

The trial court charged the jury regarding the EEOC determination as follows:

> "During the course of the trial, you have heard evidence concerning a determination of the Equal Employment Opportunity Commission. The EEOC is a government agency that investigates claims of employment discrimination. An EEOC determination is considered *highly probative* of the issues involved in discrimination cases. However, the EEOC determination is non dispositive and you may give it as great or as little weight as you determine it merits." (Emphasis added) (R.30-240).

No objection was made to the foregoing remarks to the jury by counsel, nor to the instruction.

On appeal, the 11th Circuit affirmed the admissability of the determination letter stating that precedent in that Circuit holds that a determination by the EEOC is not only admissable evidence, but is "highly probative" of the issues involved in discrimination cases, citing *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972); and *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1554 n.4 (11th Cir.1983), cert. den. -U.S.- 104 S.Ct. 2385 (1984).

The 11th Circuit then went on to hold that the failure to ask the trial court to strike the letter and the failure to object to the charge prevented the Petitioner from challenging the use of the letter on appeal even though the retaliation charge had been

dismissed. Finally, the court ruled that the trial court's ruling concerning the EEOC letter was not "plain error" resulting in a miscarriage of justice.

Based on these rulings, the 11th Circuit affirmed the judgment of the trial court.

REASONS FOR GRANTING PETITION

The Courts of Appeal for the 5th,[3] 9th,[4] and 11th[5] Circuits have adopted the rule followed in this case that the EEOC reasonable cause determination is "highly probative" of the ultimate issue involved in employment discrimination cases and that it is reversible error for a trial court to refuse to admit it.

Six Circuits disagree with the rule that the EEOC determination report is per se admissable and hold that the trial court may, in its discretion, refuse to

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[3] *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir.1972). *Smith* was based on a construction of the Federal Business Records Act, 28 U.S.C. §1732, (repealed 1975). The rule of *Smith*, that the EEOC determination is per se admissable was continued under the authority of Fed.R.Evid. 803 (8)(C) in *Garcia v. Gloor*, 618 Fed.2d 264 (5th Cir.1980) and was extended to cases tried before a jury in *McClure v. Mexia Independent School District*, 750 F.2d 396 (5th Cir. 1985).

[4] *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066 (9th Cir.1978). Extended to jury trials, *Plummer v. Western International Hotels*, 656 F.2d 502 (9th Cir.1981).

[5] *Bell v. Birmingham Linen Services*, 715 F.2d 1552 (11th Cir.1983) cert den. U.S. , 104 S.Ct. 2785. The decision below extends the rule to jury cases.

admit it.[6] Two Circuits have expressly disagreed with the holding that the report is "highly probative", finding instead, that it has little probative value, *Johnson v. Yellow Freight System, Inc.*, supra, n.6 (8th Cir.); *Denny v. Hutchinson Sales Corporation*, supra, n.6 (10th Cir.). The Seventh Circuit has approved the statement in *Johnson* that "EEOC determinations are not homogenous products; they vary greatly in quality and factual detail", *Tulloss v. Near North Montessori School, Inc.*, 776 F.2d 150, 153 (7th Cir. 1985).

The Seventh Circuit cogently observed in *Tulloss*, 776 F.2d at 153, that in cases tried before a judge only, the two rules, although theoretically different, are functionally similar. This is because in the circuits that apply the per se rule, the trial judge has the discretion to give as much or as little weight to the report as he deems appropriate, *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157-158 (5th Cir.1972); *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066, 1069 (9th Cir.1978).

Experienced trial judges realize that the parties to an employment discrimination case are entitled to a trial de novo and that the outcome of that trial is entirely dependent on the evidence presented in the court room. Trial judges also recognize that the EEOC report is based upon an ex parte investigation whose thoroughness and reliability cannot be assumed and

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[6] *Walton v. Eaton Corporation*, 563 F.2d 66 (3rd Cir.1977); *Cox v. Babcock and Wilcox Company*, 471 F.2d 13 (4th Cir.1972); *Heard v. Mueller Company*, 464 F.2d 190 (6th Cir.1972); *Tullos v. Near North Montessori School, Inc.*, 776 F.2d 150 (7th Cir. 1985); *Johnson v. Yellow Freight System, Inc.* 734 F.2d 1304 (8th Cir.1984) cert den. U.S. , 105 S.Ct.525; *Denny v. Hutchinson Sales Corporation*, 649 F.2d 816 (10th Cir.1981).

whose trustworthiness can only be determined by a thorough evaluation of the EEOC file. Trial courts are therefore likely to give the report little or no weight, see, *Tulloss*, supra, 776 F.2d at 154; *Hilton v. Wyman-Gordon Company*, 624 F.2d 379 (1st Cir.1980); *Barnes v. Atlantic Steel Co.*, 26 F.E.P. Cases 1054 (D.C.N.D. Ga. 1981).

A different situation exists when the case is tried before a jury. The circuits generally agree that it is not error to exclude from evidence the EEOC investigation file, *Tulloss*, supra, 776 F.2d at 154. In the present case, counsel for Ms. Gonzalez argued that the report should not be admitted without the simultaneous admission of the EEOC file (R.2-57), but neither side offerred it.[7] Consequently, the jury had no means of evaluating the trustworthiness of the report.

The Eighth Circuit in *Johnson*, supra, stated that although EEOC reports are admissable under Fed.R.Evid. 803 (8)(C)[8], problems resulting from their admission may outway their probative value. Such problems may include unfair prejudice to a party, the length of time a party may have to spend exposing

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[7] Petitioner's counsel told the trial court that he tried to obtain the file, but was unable to do so (R.2-57).

[8] The Eighth Circuit cited the Supreme Court's opinion in *Chandler v. Roudebush*, 425 U.S. 840, 863 n.39, 96 S.Ct.1949, 1961, 48 L.Ed 2d 416 (1976) as authority for the admissability of EEOC reports. Chandler dealt with the admissability of an administrative decision arrived at after a hearing, not a report based on an ex parte investigation and therefore is not direct authority for the admission of EEOC reports. However, in this petition, it is assumed that the report is admissable under appropriate circumstances.

the weaknesses of the report, and the inability of a party to cross-examine the report in the same way she could cross-examine an adverse witness, 734 F.2d at 1309.

The trial judge in *Johnson* had noted that the admission of the determination report would have necessitated the taking of additional evidence to apprise the jury of the nature and extent of the EEOC investigation. The Eighth Circuit commented in approval that ". . . when the probative value of evidence is minimal, a court may weigh the value of evidence against the fact that to admit it would prolong the trial", 734 F.2d at 1309-1310.

The Tenth Circuit made similar observations in *Denny v. Hutchinson Sales Corporation,* supra, where it stated its belief that the trial judge is the first and best judge of whether tendered evidence meets the standard of trustworthiness and reliability set out in Fed.R.Evid. 803 (8)(C), 649 F.2d at 821. The Tenth Circuit concluded its discussion with the comment that the admission of the report[9] might give rise to the real possibility that the jury would give undue deference to such evidence, 649 F.2d at 822.

The "per se" rule followed in this case deprives the trial judge of the flexibility accorded by the circuits adhering to the "discretionary" rule. In *McClure v. Mexia Independent School District,* 750 F.2d 396 (5th Cir.1985) the Fifth Circuit construed *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir.1972) to hold that a report cannot be rejected unless it is both harmful and non-probative.

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[9] The report in *Denny* was from the Colorado Civil Rights Commission. The difference in investigatory agencies is of no significance.

In as much as the EEOC report had been held in *Smith* to be "highly probative", a tautology was created that leaves little room for a trial judge to reject a report. The court said that under Rule 803 (8)(C) a report may be held inadmissable if the sources of information or other circumstances indicate the lack of trustworthiness, 750 F.2d at 400. This attempt to provide some degree of flexibility is illusory, because *Smith* rejected objections based on the hearsay nature of the investigation and the fact that the report contains opinions of the investigator.

Thus, the per se rule would permit a trial judge to rule against admission only if a party could prove that some outrageous act or failure on the part of the EEOC entirely vitiated the report's findings. This is a very heavy evidentiary burden for any party to bear, and it is especially onerous where the objecting party is a plaintiff with limited resources.

The adoption of the per se rule, along with its underlying rationale that the EEOC's reasonable cause determination is "highly probative" leads inevitably to a jury instruction in which the jury is admonished that the report is, in fact, highly probative.[10] Despite the fact that the jury may also be told that it can weigh the report in the same manner as any other piece of evidence, the instruction is likely to be

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[10] The Eleventh Circuit did not determine the correctness of the instruction given in this case because the petitioner did not preserve the issue by noting an objection in the trial court. Because of the foregoing ruling, the petitioner is not seeking review of the instruction by this court. Petitioner assumes that the instruction was correctly given, but points out that the use of such an instruction is one of the adverse effects of the per se rule.

construed as a command that the jury rule for the party favored by the EEOC. The reason for this is that the jury in most cases will not have access to the EEOC file and therefore will not be able to properly evaluate the report. If it holds contrary to the finding of the EEOC, it will have to do so despite "highly probative" evidence supporting a different result.

The Tenth Circuit's worry in *Denny*, supra, that the jury might give undue deference to the report is virtually certain to become a reality where such an instruction is given. The error underlying the per se rule is the judicial finding, without a factual basis, that the EEOC report is always probative. Without that rationale, there is no basis for denying trial judges the flexibility accorded to them by the Circuits adopting the discretionary rule.

The per se rule will inevitably introduce an unfair element into all employment discrimination cases tried to a jury. The adverse effect that the continued use of the per se rule will have on the fact finding processes of juries is a highly appropriate reason for this Court to exercise its discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be granted.

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APPENDIX

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APPENDIX A

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5497
Non-Argument Calendar

GRECIA GONZALEZ,
Plaintiff-Appellant,

versus

DADE COUNTY PUBLIC HEALTH TRUST
d/b/a JACKSON MEMORIAL HOSPITAL,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(April 28, 1986)

Before FAY, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:

Appellant, Grecia Gonzalez, filed suit against the Dade County Public Health Trust d/b/a Jackson Memorial Hospital in the District Court for the Southern District of Florida alleging discrimination on the basis of national origin under Title VII, 42 U.S.C.S. 1981, 42 U.S.C. § 1983 for failure to promote, and for retaliation against her in violation of Title VII. She appeals, as clearly erroneous, the trial court's findings of fact and conclusions of law

dismissing her claims of discrimination and finding in favor of defendant. She further argues that since she withdrew her retaliation claims, the trial court erred in not withdrawing from consideration by the jury the EEOC "no-cause" determination with respect to her retaliation claim. We disagree and affirm the decisions of the trial court.

The Court of Appeals will not set aside a district court's findings of fact unless they are clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273, 102 S. Ct. 1781, 72 L.E. 2d 66 (1982). Here, the record provides ample evidence to support the trial court's findings of fact and conclusions of law that appellant failed to prove her Title VII discrimination claim against appellee.

The EEOC letter at issue was offered and received into evidence during trial. Appellant's objection to the letter as inadmissible hearsay was properly overruled by the trial court. The courts in this circuit have consistently held that a determination by EEOC is not only admissable evidence, but "highly probative" of the issues involved in discrimination cases. Smith v. Universal Services, Inc., 454 F.2d 154, 157 (5th Cir. 1972); Bell v. Birmingham Linen Service, 715 F.2d 1552, 1554 n.4 (11th Cir. 1983), *cert. denied*, _ U.S. ___, 104 S. Ct. 2385 (1984).

It was not until long after the letter was admitted into evidence, at the close of her case in chief, that appellant withdrew her retaliation claim. She failed to ask the court to strike the EEOC letter from the evidence, and raised no objection to the court's charge on how the letter should be considered and reviewed by the jury. Appellant's failure to object to the trial court's ruling prevents her from challenging the ruling on appeal except upon proof of plain error. Fed. R. Civ. P. 51. The courts have defined plain error as error "so fundamental as to result in a miscarriage of justice." Whiting v. Jackson State University, 616 F.2d 116, 126 (5th Cir. 1984). The record in no way supports appellant's assertion that the trial court's rulings

concerning the EEOC determination were plain error resulting in a miscarriage of justice.

The judgment of the trial court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-832-CIV-KEHOE

GRECIA GONZALEZ,

Plaintiff,

v.

PUBLIC HEALTH TRUST,
a/k/a JACKSON MEMORIAL HOSPITAL,

Defendant.

JUDGMENT ON JURY VERDICT

This action came on for trial before the court and a jury, Honorable James W. Kehoe, District Judge, presiding, and the issues having been duly tried and the jury rendered its verdict,

It is

ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant recover of the Plaintiff his costs of action.

DATED at Miami, Florida, this 15th day of April, 1985.

/s/ ROBERT M. MARCH
ROBERT M. MARCH
CLERK OF COURT

by /s/ MARY B. POWELL
MARY B. POWELL

COURTROOM DEPUTY

CC: STEVEN CAHEN, ESQ.
LEE KRAFTSCHICK, ESQ.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-5497

GRECIA GONZALEZ,
Plaintiff-Appellant,

versus

DADE COUNTY PUBLIC HEALTH TRUST d/b/a JACKSON MEMORIAL HOSPITAL,
Defendant-Appellee.

FILED
JUN 6 1986

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING
(June 6, 1986)

BEFORE: FAY, JOHNSON and CLARK, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant is denied.

ENTERED FOR THE COURT:

/s/ PETER FAY
United States Circuit Judge

APPENDIX D

Miami District Office
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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Phone (305) 350-4491
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Grecia H. Gonzalez
1041 N. E. 154 Terrace
No. Miami Beach, FL 33162 Charging Party

Jackson Memorial Hospital
1612 N. W. 12th Ave.
Miami, FL 33126 Respondent

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge filed under Title VII of the Civil Rights Act.

All title VII jurisdictional requirements have been met. Charging Party alleges that she was discriminated against by the Respondent by being retaliated against in violation of Section 704A of Title VII of the Civil Rights Act of 1964, as amended because she previously filed an EEOC Charge (046831113) against the Respondent on 6/23/1983.

Examination of the evidence indicates there is no reasonable cause to believe that this allegation is true. No determination is made as to any other issues which might be construed as having been raised by this charge.

This concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue the

matter further, she may do so by filing a private action in Federal District Court against the Respondent named above, within 90 days of receipt of this letter, and by taking the other procedural steps set out in the enclosed Notice of Right To Sue.

On Behalf of the Commission:

9/10/84
Date

/s/ FREDERICO GOSTALES
FREDERICO GOSTALES, District Director

Enclosure
Notice of Right To Sue

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